

Date: May 7, 1998

Case No.: 96-INA-00269

In the Matter of:

ZEPHYR GRILL RESTAURANT,
Employer

On Behalf Of:

COLIN JOSEPH CRASTO,
Alien

Appearance: Franklin S. Abrams, Esq.
For the Employer/Alien

Before: Holmes, Huddleston, and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the

responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,¹ and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On April 25, 1994, Zephyr Grill Restaurant ("Employer") filed an application for labor certification to enable Colin Joseph Crasto ("Alien") to fill the position of Sous-Chef. (AF 7). The job duties for the position are:

Supervise and coordinate activities of cooks and other kitchen workers.
Supervise preparation, portioning, and garnishing foods. Give instructions to cooks in fine points of cooking. Cooks/carve meats, prepare dishes during rush periods and for banquets and other social functions. Supervise entire kitchen in absence of executive chef.

The requirements for the position are:

Education	-	Grade School - 8 years; High School - 4 years
Training	-	Two years - Hotel/Restaurant Management Training Course
Experience	-	Four years in job offered or four years as a Chief Cook or Chef

Special requirements listed working hours 10:00 a.m. to 8:00 p.m. with 2 hours off. Will work Thursdays through Mondays; supervise 10 to 15 cooks, dishwashers, pantry goods makers and helpers. (AF 7).

Employer submitted to the state agency a recruitment report dated April 27, 1995 and detailing its reasons for rejecting all 15 U.S. workers who applied for the job. (AF 124-127). Regarding applicant Luisito Cobacha, Employer's report reads as follows:

We wrote Mr. Cobacha by certified mail and he received our letter. He called us on March 27 but spoke such poor English that we could not even understand his name. I did not realize that he was the Mr. Cobacha who had sent us a resume. When I realized who he was, I tried to call him back. One of the two numbers, (718) 850-0483 was disconnected. I left a message on the other one on April 17, but he has not called back so I assume he is not interested. As I stated, in any case, his English was so poor that he would be unable to function in the position we have available. (AF 126).

¹ All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

Regarding applicant Frederick Cohen, employer reported that it “wrote Mr. Cohen by certified mail. He has not responded. We are writing him again to confirm his lack of interest” (AF 126).

The CO issued a Notice of Findings on October 18, 1995 (AF 164-167), proposing to deny certification on two grounds: Employer rejected two qualified U.S. worker applicants, Luisito Cobacha and Frederick Cohen, without providing lawful, job-related reasons and thereby violated 20 C.F.R. § 656.21(b)(6); and, Employer failed to recruit in good faith and thereby violated 20 C.F.R. § 656.20(c)(8). The CO questioned Employer’s assessment of Mr. Cobacha’s language skills (AF 165). Based on Mr. Cobacha’s educational and work experiences in London and New York and the fact that a letter he sent to the state agency was written “in flawless English,” the CO found it unlikely that Mr. Cobacha’s language skills were poor enough to disqualify him from the position offered (AF 165).

Regarding Mr. Cohen, the CO questioned Employer’s claim that Mr. Cohen did not respond to its certified letter (AF 165). In his letter to the state agency, Mr. Cohen denied being contacted by Employer (AF 155-156). The CO noted that the receipt for the certified mail sent to Mr. Cohen does not bear a postmark indicating the date on which it was mailed (AF 99). The CO further noted that no documentation submitted by Employer indicates when Mr. Cohen received the certified letter (AF 166).

Employer was directed to “document further the rejections of [Cobacha and Cohen]” and to “reply to [the] issues raised in this Notice of Findings” (AF 165). Accordingly, Employer was notified that it had until November 22, 1995, to rebut the findings or to cure the defects noted (AF 167).

In its rebuttal dated November 14, 1995, Employer addressed the CO’s concerns (AF 178-179). Employer submitted a return receipt for a certified letter sent to Mr. Cohen (AF 177). The letter to which the return receipt pertained was mailed on May 2, 1995 (AF 177). Employer claims that Mr. Cohen signed for the letter on May 5, 1995.² Employer noted that “[t]he ‘date of delivery’ is frequently hand written by the postal worker who delivers the mail” (AF 179). Employer did not address the CO’s concern that the date of mailing on the Receipt for Certified Mail is hand-written rather than being a postal stamp.

Concerning Mr. Cobacha, Employer’s rebuttal repeated its recruitment report dated April 27, 1995 (AF 179). Employer added that “towards the end of the March 27 telephone conversation, we realized that [the person] with whom ... we were speaking was [Mr. Cobacha]” (AF 179). Employer indicated that its further attempts to contact Mr. Cobacha by telephone were unsuccessful (AF 179). Employer claimed to have sent a second certified letter to Mr. Cobacha (AF 179). A Receipt for Certified Mail, bearing a hand-written posting date of May 2, 1995, and the envelope of the certified letter stamped “Unclaimed” were submitted with the

² The Appeal File contains a photocopy of the front of the return receipt, which bears Mr. Cohen’s signature. The File does not contain a copy of the back, on which the date of delivery is found. Because the date on which Mr. Cohen received the second letter does not affect the decision in this case we accept, *arguendo*, Employer’s contention that Mr. Cohen signed for the letter on May 5, 1995.

rebuttal (AF 173). Employer's recounts a third certified letter sent to Mr. Cobacha (AF 179). Evidence submitted with the rebuttal indicates this third letter was posted on May 22, 1995 and received by Mr. Cobacha on June 14, 1995 (AF 175). Employer indicates that since his receipt of the third letter, Mr. Cobacha has not contacted them (AF 179). Employer repeated its claim that, judging from its one telephone conversation with Mr. Cobacha, his poor English skills disqualify him from consideration (AF 179). Employer concluded its rebuttal by stating that it is "sure that if you contact Mr. Cobacha by telephone, you will be unable to carry on a conversation with him. After all, we have spoken to him personally and you have not" (AF 180).

The CO issued the Final Determination on December 11, 1995 (AF 180-183), denying certification on the grounds that Employer failed to submit sufficient evidence to demonstrate its good faith during the recruitment process, thereby violating 20 C.F.R. § 656.20(c)(8), and the Employer failed to provide lawful, job-related reasons for rejecting U.S. workers, thereby violating 20 C.F.R. § 656.21(b)(6). The CO noted that Employer's evidence regarding Mr. Cohen pertains to the second certified letter, not the first (AF 181). The CO wrote that "[s]ince employer appears to be interested in this qualified candidate, it is not clear why employer conducted follow-up six weeks after initial contact..." (AF 181). The CO noted the absence of a return receipt for the first certified letter Employer sent to Mr. Cohen and that Mr. Cohen denied having any contact with employer (AF 181). The CO termed it "puzzling [that] after contact was made in May that [Mr. Cohen] was not hired for the position; employer seems still to be recruiting ... and [Mr. Cohen] remains qualified" (AF 181).

Regarding Employer's recruitment of Mr. Cobacha, the CO noted that the follow-up took place after the close of recruitment (AF 181). Stating that the reason for the delay was unclear, the CO wrote that "[i]f employer was re-contacting [Mr. Cobacha], it appears [that his] qualifications are not in question" (AF 181). As to Mr. Cobacha's language skills, the CO regarded a single, short conversation as inadequate to evaluate Mr. Cobacha's English, especially in light of his educational and work accomplishments (AF 181). Because Employer failed to carry his burden regarding Mr. Cohen and Mr. Cobacha, the CO denied the application (AF 181).

On January 10, 1996, the Employer requested review of the Denial of Labor Certification (AF 212). The CO denied reconsideration on March 29, 1996, and on April 4, 1996, forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board").

Discussion

The CO denied Employer's labor certification application in the case *sub judice* on the grounds that there were U.S. workers who were qualified, willing, and available for the job offered, and that Employer failed to recruit U.S. workers in good faith. We agree.

If U.S. workers have applied for the job opportunity, the employer shall document that they were rejected solely for lawful, job-related reasons, 20 C.F.R. § 656.21(b)(6). An employer must clearly show that the job opportunity has been and is clearly open to any qualified U.S. worker, 20 C.F.R. § 656.20(c)(8). The regulations implicitly require an employer's recruitment to be conducted in "good faith." *H.C. LaMarche Ent., Inc.*, 87-INA-607 (Oct. 27, 1988). An employer's failure to timely contact U.S. applicants can constitute a lack of good faith when the probable result of the delay is a chilling effect on applicants. *Loma Linda Food, Inc.*, 89-INA-289 (Nov. 26, 1991)(en banc).

Employer's recruitment report indicates that a certified letter was sent to Mr. Cohen, but that he had not answered (AF 126). Notably missing from that report is any claim that either Mr. Cohen received the letter or that it was returned as undeliverable. That absence is echoed by the fact the Employer submitted photocopies of the letter sent to Mr. Cohen and the Receipt for Certified Mail for the letter (AF 99), but failed to submit a copy of the return receipt itself. The absence of the return receipt is underscored further by Employer's submission of photocopies of 11 return receipts for letters sent to 13 applicants whose resumes were forwarded by the state agency to Employer (AF 69, 71, 75, 87, 90, 93, 112, 116, 118, 121, 123). Employer's failure to claim that its letter was delivered stands in contrast with Mr. Cohen's affirmative claim that he was not contacted by Employer (AF 155-156).

Despite the CO's mention of the absence of the return receipt and the directive to "document further the rejections of ... U.S. workers..." (AF 165), Employer failed to submit additional evidence regarding its first certified letter to Mr. Cohen. Instead, Employer submitted documentation regarding the second certified letter it sent (AF 177). The second letter was posted on May 2, 1995, five weeks and five days after the posting of the first on March 23, 1995 (AF 176-177). Although Mr. Cohen's telephone number is clearly marked on his resume, (AF 97), Employer makes no claim that it tried to telephone Mr. Cohen during the period between the two letters.

When viewed as a whole, Employer's failure to document the disposition of its first letter to Mr. Cohen, the delay between the two letters, Employer's failure to contact Mr. Cohen by phone during the delay, and Mr. Cohen's claim that he was not contacted render Mr. Cohen's version of the events more credible than that of Employer. As a result, we find that Employer has failed to carry its burden³ regarding its good faith recruitment of Mr. Cohen.

³ In its Brief for Appellant, Employer objects to the CO's language in the Final Determination that Employer failed to make a "conclusive indication of good faith." Employer claims that the CO thereby placed an improper burden upon Employer. While it would be best if the CO avoided such non-standard language in the

Because Employer's lack of good faith in recruiting Mr. Cohen is sufficient grounds upon which to affirm the denial of labor certification, we do not reach any other issues raised.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: (1) when full Board consideration is necessary to secure or maintain uniformity of its decision; and, (2) when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

*Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002*

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.

future, the words "conclusive indication" do not imply any specific level of proof. In the instant case, Employer has failed to show by a preponderance of the evidence that it recruited Mr. Cohen in good faith.

